

ORIGINAL TRANSCRIPT

UNITED STATES BANKRUPTCY COURT DISTRICT OF UTAH

CONFIRMATION HEARING
CONTINUED FROM JUNE 25,
2010

IN RE: EASY STREET
HOLDING, LLC

) Bankruptcy Case No.
) 09-29905
) Jointly Administered
) with Cases 09-29907
) and 09-29908
) Chapter 11
) Honorable R. Kimball
) Mosier

June 28, 2010 * 9:33 a.m.

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Salt Lake City, Utah 84102

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DISTRICT OF UTAH

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THE BAILIFF: All rise. Court resumes in session. Please be seated.

This is in the matter of Easy Street
Holding, LLC.

THE COURT: Will counsel please note their appearances?

MR. CANNON: Your Honor, Kenneth Cannon, Durham, Jones & Pinegar. With me is Michael Blumenthal from Crowell & Moring. On the telephone with us is Bruce Zabarauskas from Crowell & Moring, all co-counsel for the debtor in possession.

MS. JARVIS: Your Honor, Annette Jarvis of Dorsey & Whitney on behalf of WestLB, and shortly to be joining me will be Rich Havel of Sidley Austin. He is in transit and will -- begs the forgiveness of the Court for slipping in later. And also on the phone, we have Kristina Craig from Sidley Austin, all of us are counsel for WestLB.

MR. JENKINS: Good morning, your Honor.
Lon Jenkins of the firm of Jones, Waldo, Holbrook &
McDonough on behalf of the unsecured creditors
committee.

MR. WILSON: Good morning, your Honor, Kim

1 Wilson -- excuse me. Addie, please go ahead.

2 MS. MAUDSLEY: Your Honor, Addelaide
3 Maudsley of Chapman & Cutler on behalf of Bay North.

4 THE COURT: Just keep coming.

5 MR. WRONA: Your Honor, Joe Wrona, Wrona
6 Law Firm, special counsel for debtor.

7 MR. GORDON: Corbin Gordon, of Corbin B.
8 Gordon PC, special counsel for the debtor as well.

9 MR. WILSON: Good morning, your Honor.
10 Kim Wilson for David Wickline, for Alchemy Ventures
11 Trust, LLC as member and manager of and on behalf of
12 Cloud 9 Resorts, Sky Lodge Development LLC, and Cloud
13 9 Resorts, Sky Lodge Management, LLC.

14 MR. HOFMANN: George Hofmann appearing on
15 behalf of Park City I, LLC.

16 MR. PAYNE: Your Honor, Doug Payne on
17 behalf of Gateway Center, LLC and also on behalf of
18 various unit owners.

19 THE COURT: Before we begin this morning,
20 I'd like to visit the standing issue. At the last
21 hearing on Friday, Mr. Blumenthal and Mr. Havel
22 raised standing objections with respect to Park City
23 I and Alchemy Ventures Group, LLC. And if the
24 parties have what Mr. Wilson introduced as Exhibit
25 W1, I'd like to look at that a minute and --

1 So the case before the Court is the
2 second-to-the-bottom box, Easy Street Partners, LLC,
3 and it is a wholly owned subsidiary of Easy Street
4 Mezzanine, LLC, which is in bankruptcy and is jointly
5 administered with this case. Easy Street Mezzanine
6 is wholly owned by Easy Street Holding, LLC, which is
7 also in bankruptcy and is jointly administered with
8 this case.

9 In order for Park City I and Alchemy
10 Ventures Group, LLC to assert standing as a result of
11 their equity ownership in Easy Street Holding, LLC,
12 there must be at least some prospect of a
13 distribution to those parties.

14 Last Friday, Mr. Hofmann argued that one
15 of the changes in the amended plan is that the
16 litigation between the unsecured creditors committee
17 and WestLB was going to be compromised and settled,
18 and in the initial plan -- and because of that, there
19 would be no distribution to his client, and under the
20 initial plan, there may have been some distribution
21 to his client. The litigation of the unsecured
22 creditors committee with WestLB is not a money
23 recovery, but even if it were seeking a money
24 recovery, all that would mean is that WestLB would
25 pay unsecured creditors but WestLB's claim would

1 still need to be paid in this case.

2 So the evidence before the Court is that
3 we have real property worth \$20,600,000. We have
4 mechanic's liens of approximately 1.7 million
5 dollars. WestLB's secured claim is in excess of 17
6 million dollars, and unsecured creditors are owed in
7 excess of a million dollars. So it's unlikely -- and
8 I say unlikely, but it looks like an impossibility,
9 but it's unlikely that any money would go to equity
10 of Easy Street Partners. If any distribution was
11 made to Easy Street Mezzanine, the equity holder of
12 Easy Street Partners, it has a debt to North LB -- or
13 excuse me -- Bay North in excess of \$12 million, and
14 it's unimaginable that Easy Street Mezzanine would
15 get more than \$12 million out of this case. So I
16 fail to see the economic interest or stake that Park
17 City I and Alchemy Ventures Group, LLC, as equity
18 holders of Easy Street Holding have in these
19 proceedings.

20 Well, Mr. Hofmann, if you want to address
21 that.

22 MR. HOFMANN: I do, your Honor. I
23 submitted to the Court this morning, and the parties,
24 an exhibit binder with two exhibits. I think they
25 should be fairly noncontroversial. One is the

1 approved disclosure statement dated February 25th and
2 the second exhibit is the Complaint of the unsecured
3 creditors committee against WestLB. And I'd like to
4 focus on the second exhibit, which is the Complaint.
5 I think that is susceptible of judicial notice. And
6 it's true that Complaint does seek the equitable
7 subordination of the claims of WestLB, but it seeks
8 more than that and I would direct the Court, in
9 particular, to pages 17, 18 of the Complaint. And
10 the Complaint alleges that before the debtor's
11 bankruptcy filing, it entered into a forbearance
12 agreement with WestLB, and under that forbearance
13 agreement the debtor released claims against WestLB.
14 And I think that has been the basis of much
15 subsequent activity in this case and before it, for
16 that matter. And the committee alleges that that
17 grant of a release of claims in favor of WestLB is a
18 fraudulent transfer and seeks the recovery of that
19 fraudulent transfer under Section 544 of the
20 Bankruptcy Code and applicable Utah state law. And
21 then the fourth cause of action, the Complaint in
22 Paragraph 18 requests on behalf of the estate the
23 turnover of that cause of action to the estate. Now,
24 if those claims were property of the bankruptcy
25 estate, then the estate would have at least a defense

1 to the breach of contract claim by WestLB, if not an
2 affirmative counterclaim in excess of the amount of
3 the claim if it even were allowed. Essentially, the
4 allegation is, your Honor -- I can walk the Court
5 through the Complaint if it would be helpful, but the
6 basic allegation is that WestLB destroyed this
7 debtor. It destroyed its business and as a result of
8 that, WestLB should pay the consequences. It should
9 compensate the estate with damages. And WestLB
10 forced the debtor before its bankruptcy filing to
11 give up those claims in a fraudulent transfer.

12 So if this judgment were granted as prayed
13 in this Complaint, you would have, at best, a
14 subordinated WestLB claim but possibly more. You
15 could have them not have an allowed claim at all by
16 virtue of there being a defense to their breach of
17 contract claim because they breached their contract
18 to the debtor or an affirmative recovery against
19 WestLB. So that is one point I'd make.

20 A secondary point -- I'm not as familiar
21 with the litigation against Bay North, but I am aware
22 there is a Complaint filed against Bay North that
23 would affect the Mezzanine level.

24 Beyond that, your Honor, I would ask the
25 Court who has standing on behalf of the equity

1 security holders to complain if this plan were
2 treated unfailure -- unfairly? Excuse me. But this
3 is, as the Court pointed out, the case of Easy Street
4 Partners. Easy Street Mezzanine is the equity holder
5 of Easy Street Partners. Does the Court think it's
6 likely that the equity security holder, Easy Street
7 Mezzanine, through the same counsel, controlled by
8 the same people is going to object to the plan it
9 filed in another case? I don't think so. I think
10 that given those conflicting interests that it's
11 appropriate to consider the objection of Park City I.
12 And I would note, looking at Exhibit W1, Park City I
13 and Alchemy Ventures, excuse me, combined hold 51
14 percent of the equity interest in Easy Street
15 Holding, which, in turn, owns 100 percent of the
16 holding in Easy Street Mez. So the parties that are
17 objecting to the plan represent 51 percent of the
18 equity security holders that chose, for whatever
19 reason, not to object to this plan.

20 So I think that for those reasons, because
21 of the nature of the relief sought by the creditors
22 committee in its Complaint, and because of the
23 conflicts of interest that the debtor and its
24 affiliates hold, that it's appropriate to consider
25 Park City I's objection.

1 THE COURT: Mr. Jenkins?

2 MR. JENKINS: Your Honor, if I could be
3 heard briefly on this issue, having filed the
4 Complaint. I do want to point out to the Court that
5 when we were all speaking about the Complaint on
6 Friday, we spoke of it in terms of an equitable
7 subordination action and that is -- that was the
8 primary thrust of the lawsuit. We did, in fact --
9 and my first words out of my mouth today when I took
10 the podium to put Mr. Elliot on the stand were to
11 clarify for the Court and for anyone else in the
12 courtroom that the lawsuit did also include a
13 fraudulent transfer cause of action. That fraudulent
14 transfer, as we alleged, was not an exchange of cash
15 as such. It wasn't money that was fraudulently
16 transferred. What it was, was our position that the
17 release that the debtor gave to WestLB in connection
18 with a forbearance agreement which was entered into
19 in March of 2009, that that release, in and of
20 itself, constituted a fraudulent transfer of whatever
21 claims the estate may or may not have had.

22 The result of the lawsuit, in our view,
23 even were we to prevail on the fraudulent transfer
24 cause of action would be that the causes of action,
25 whatever they may be, would then revest in the

1 debtor's estate and then the debtor presumably would
2 have the opportunity to determine whether or not it
3 wanted to pursue those claims against WestLB or,
4 alternatively, if the committee was unsatisfied with
5 the debtor's response to that, the committee perhaps
6 could move the Court to allow it to have standing to
7 pursue those causes of action, but that is down the
8 road.

9 But in any event, your Honor, I would
10 point out that if these claims and causes of action
11 that the debtor had waived somehow resulted in an
12 affirmative money judgment or some defenses that
13 could be asserted against the WestLB claims,
14 nevertheless, whatever funds that there would be
15 would have to go first, of course, into the Partners'
16 estate, which, as you noted, there are roughly 20 or
17 more million dollars' worth of claims against. Any
18 residual that was left over for equity would then
19 have to go into the Mezzanine estate. And I would
20 advise the Court and I believe that the Court can
21 take notice of the claims docket in the Mezzanine
22 case, but in the Mezzanine case, among other claims,
23 there is an asserted Bay North claim that is listed
24 at \$44 million. Now, whatever disputes there may be
25 to that amount would certainly have to be resolved.

1 But at the end of the day, if there was anything left
2 to go to the holding level, which seems unlikely with
3 the magnitude of claims, then, of course, any claims
4 that have been asserted against Holding would have to
5 be paid before Park City I would be allowed to
6 receive any distribution as part of its liquidation
7 preference.

8 I'd also note for the Court that Park City
9 I did file a claim in the Holding case representing
10 its claim for its liquidation preference, but that
11 operating agreement that gives Park City I the
12 liquidation preference also provides that all claims
13 of Holding would have to be paid before Park City I
14 can receive any return.

15 And so notwithstanding the suggestion
16 that, you know, maybe in some hypothetical
17 situation -- and we do have to deal with, I guess,
18 hypotheticals calls because the possibilities seem
19 quite remote, but even addressing those it seems
20 unlikely that Park City I could be anywhere near the
21 money in this case, and I believe the Court's ruling
22 was correct on that score. Thank you, your Honor.

23 THE COURT: Mr. Wilson?

24 MR. WILSON: May I just be heard briefly?
25 Alchemy Ventures Group has equity through its member,

1 Alchemy Ventures Trust, with regard to the Court's
2 comments on equity, joins in the statements of
3 counsel for Park City I. However, I need to advise
4 the Court that Alchemy Ventures Trust is a 50 percent
5 owner of claimants, Cloud 9 Resorts, Sky Lodge
6 Development, LLC.

7 THE COURT: I'm aware of that. I was
8 talking about --

9 MR. WILSON: I presumed that to be the
10 case. And with that clarification, that's all I
11 have. Thank you, your Honor.

12 THE COURT: Mr. Blumenthal?

13 MR. BLUMENTHAL: A couple of brief points,
14 your Honor. The -- when your Honor outlined the
15 claims, I would just like to also add that the
16 testimony was there was additionally --

17 THE COURT: Administrated.

18 MR. BLUMENTHAL: -- over a million dollars
19 of administration claims and 200 priority claims.
20 And I just would like to point out, someone made
21 mention of the Bay North adversary, well, Easy Street
22 Mez and Easy Street Holding were also plaintiffs in
23 that action. No one is precluding anyone from
24 pursuing those actions up at that level. But -- and I
25 also would just remind the Court that Easy Street

1 Partners also released its claims against WestLB in
2 the cash collateral stipulation and order in the
3 beginning of this case, and we didn't hear a word
4 from PC I at that point in time. Because for them to
5 come here ten months later, I think it is a bit late.

6 THE COURT: Well, I guess that Mr. Hofmann
7 raises one point that does concern the Court, and
8 that is that all of these debtors are -- do have the
9 same counsel. And the Court has approved the
10 employment of counsel for the debtors, believing that
11 there is some judicial economy in having these
12 estates administered jointly. I don't know that
13 there are any issues relating to the equity interest
14 of Park City I, LLC and Alchemy Ventures Group as
15 equity that would not be raised by Mr. Wilson,
16 representing Alchemy Ventures Trust as a 50-percent
17 member of Development and Management. So I will at
18 this point continue to let Park City I and Alchemy
19 Ventures Trust participate in the hearing, but let's
20 try to keep the matter narrowly focused. And
21 Mr. Wilson, I think that Mr. Shoaf was on the witness
22 stand and Mr. Wilson was going to cross-examine. So
23 Mr. Shoaf, if you would come forward.

24 You are still under oath, Mr. Shoaf, so
25 you just may take the stand.

1 MR. WILSON: Your Honor, Mr. Hofmann was
2 just speaking to me. He has an obligation in another
3 court at 10:30 and wonders, could he go first. I
4 certainly think that is --

5 THE COURT: All right. That would be
6 fine.

7 MR. HOFMANN: Your Honor, much of my
8 questioning for Mr. Shoaf is -- probably goes beyond
9 the scope of direct. Depending on the Court's
10 ruling, I -- for the interest of making this as quick
11 as possible, I would like to ask my questions now.
12 But if the parties would object on that basis and the
13 Court would sustain those, then I would request that
14 Mr. Shoaf be available for examination during Park
15 City's direct case instead.

16 THE COURT: All right. So the way that
17 Park City I anticipates this proceeding is once the
18 debtors have submitted their evidence, then Park City
19 I wishes to present its evidence?

20 MR. HOFMANN: I think that would be normal
21 course, but in the interest of efficiency and making
22 this as quick as possible, I'm happy to take the
23 witness now as part of Park City I's direct case.
24 That would go beyond the scope of direct.

25 THE COURT: Is there any objection to

1 that, Mr. Blumenthal?

2 MR. BLUMENTHAL: Depending upon the
3 questions he asks, none.

4 THE COURT: But preceding, allowing
5 Mr. Hofmann's examination exceeds the scope of direct
6 examination --

7 MR. BLUMENTHAL: That is not a problem,
8 assuming it's relevant to this confirmation hearing.

9 THE COURT: You may proceed, Mr. Hofmann.

10 MR. HOFMANN: Thank you.

11

12 CROSS-EXAMINATION

13 BY MR. HOFMANN:

14 Q. Mr. Shoaf, do you recall when WestLB
15 declared this -- that their loan to be in default?

16 A. To be very precise, the loan was declared
17 in default on July 2 of 2009 but was due on March
18 29th of 2009. So they demanded payment at that time.

19 Q. On July 2nd?

20 A. No. They demanded payment on the 30th of
21 March.

22 Q. And are you aware that there was a payment
23 of about \$5.6 million in February 2008 to Bay North?

24 A. Yes.

25 Q. Do you believe that payment was either

1 improper or mistaken?

2 MR. BLUMENTHAL: Objection. It has really
3 nothing to do with this hearing, your Honor.

4 MR. HOFMANN: It has to do with whether
5 the release of WestLB should be approved, your Honor,
6 in good faith.

7 MR. BLUMENTHAL: Your Honor, the debtor
8 has not -- had released WestLB approximately ten
9 months ago and PC I did not object at that point in
10 time.

11 THE COURT: Well, I think what Mr. Hofmann
12 is arguing, and this is -- I guess, taking this
13 examination out of order creates a bit of the
14 confusion. I think the anticipation would be the
15 committee would testify regarding the proposed
16 settlement and then Mr. Hofmann would call Mr. Shoaf
17 to challenge the advisability of that settlement.

18 MR. HOFMANN: If the Court would prefer,
19 I'm happy to take it in that order.

20 MR. BLUMENTHAL: I would have the same
21 objection then, your Honor, because Easy Street
22 Partners is the -- had previously released them. And
23 I think PC I clearly waived any issues regarding that
24 about ten months ago -- about nine months ago.

25 THE COURT: Well, but the question is

1 focusing on the settlement of the committee's
2 litigation. So proceed, Mr. Hofmann.

3 MR. HOFMANN: Thank you.

4 Q. (By Mr. Hofmann) The payment to Bay North
5 was either improper or mistaken, correct?

6 A. I don't know that I have the right to
7 judge what happened other than it did happen.

8 Q. Well, could I direct you, then, Mr. Shoaf,
9 to Exhibit 1. That's the amended disclosure
10 statement. It's in the black binder in front of you.

11 A. Sure.

12 Q. If you would, turn to page eight. Well,
13 first of all, do you recognize the disclosure
14 statement?

15 A. Yes.

16 Q. Did you direct its filing with the
17 bankruptcy court?

18 A. Yes.

19 MR. HOFMANN: Your Honor, I'd request
20 admission of Exhibit 1.

21 THE COURT: Well, perhaps we should
22 renumber it as Exhibit A. We already have Exhibit 1
23 and Exhibit W1, so...

24 MR. HOFMANN: I agree. Perhaps when this
25 is done, we could renumber them PC-1. I think the

1 debtor also has A and B. That might be easiest.

2 THE COURT: All right. The Court will
3 receive Exhibit PC-1.

4 (Exhibit-PC-1 received.)

5 Q. (By Mr. Hofmann) Mr. Shoaf, I'm looking
6 at page eight of the disclosure statement, and I'm
7 looking at -- there is -- under Item 2, Bay North
8 Mezzanine loan, there is a second paragraph. The
9 second sentence of that says, "It is the debtor's
10 position that the Bay North transfer was mistakenly
11 and/or improperly made." Do you see that sentence?

12 A. Yes.

13 Q. Do you disagree with that statement?

14 A. No.

15 Q. Okay. Did that payment lead to WestLB
16 declaring its loan to be in default?

17 A. The loan was not renewed in March of 2009
18 and it was deficient by five million dollars
19 according to the records that WestLB provided me.
20 That money is one of the reasons that they did not
21 renew the loan. It was due and payable on March 29th
22 and we were seeking a one-year renewal.

23 Q. Did the debtor have the right under the
24 contract to extend the loan?

25 A. If we had certain criteria, yes, sir.

1 Q. Right. Did the fact of the 5.6 million
2 dollar payment prevent the debtor from exercising the
3 right to extend the loan?

4 A. It was one of the reasons, yes.

5 Q. Did it lead to the failure to extend the
6 loan -- or the -- WestLB refusing to allow the debtor
7 to extend the loan?

8 MR. BLUMENTHAL: Object to the form.

9 THE COURT: Sustained.

10 Q. (By Mr. Hofmann) Did the 5.6 million
11 dollar payment to WestLB lead to the failure of
12 WestLB to extend the WestLB senior loan?

13 MR. BLUMENTHAL: Object. Same objection.
14 Form. Also it calls for what was in WestLB's mind.

15 THE COURT: I don't think it calls for a
16 question of what was in WestLB's mind. So the
17 objection is overruled.

18 THE WITNESS: The payment of the 5.6
19 resulted in the deficiency of the balance, which was
20 one of the reasons they cited for not renewing the
21 loan.

22 Q. (By Mr. Hofmann) Let me try it this way.
23 If you would turn back to that same page, Exhibit
24 1 -- PC-1, excuse me -- page eight, footnote five.

25 A. Sure.

1 Q. The second sentence starts, "The debtors
2 assert that the erroneous payment has led to -- " and
3 I'll skip some language. "Item B, failure of WestLB
4 to extend the WestLB senior loan." Do you see that?

5 A. Yes.

6 Q. Do you believe that is an accurate
7 statement?

8 A. Yes.

9 Q. Okay. Thank you.

10 When WestLB declared its loan to be in
11 default, how much money was in WestLB's lockbox bank
12 account on behalf of the debtor?

13 A. Well, three and a half million is my
14 recollection.

15 Q. And was one of the purposes of that
16 lockbox account to pay interest due on the WestLB
17 loan?

18 A. Well, we need to be clear. There were
19 several accounts. There was a lockbox account and
20 there were three escrow accounts. The 3.5 million,
21 more or less, was in the escrow accounts, which was
22 from net proceed sales from real estate sales. The
23 lockbox account was money that travels in the course
24 of doing -- operating business.

25 We would use money from a lockbox account

1 to pay interest, and if we had a deficiency in the
2 lockbox, we would request that funds be sent from the
3 escrow accounts to fill the lockbox up.

4 Q. Did you request that those -- the money in
5 those accounts be used to pay WestLB's interest
6 payments?

7 A. We made a distribution -- a request for
8 payment of three months of interest, yes.

9 Q. Did WestLB grant that request?

10 A. No.

11 Q. Did the debtor request -- make that
12 request more than once?

13 A. We made one formal request and I don't
14 remember how many times we may have asked on the
15 phone.

16 Q. Several times?

17 A. Yes.

18 Q. And all of those requests were refused?

19 A. Yes.

20 Q. Were one of the purposes of one or more of
21 the accounts you just mentioned to pay for
22 contractors doing work on the property?

23 A. Yes. Those would be the escrow accounts.

24 Q. With the 3.5 million dollars in it?

25 A. Correct.

1 Q. And did you request that that money be
2 made available to pay contractors working on the
3 property?

4 A. Yes. Distribution 23 was submitted in, if
5 I remember correctly, February of 2009.

6 Q. And did WestLB agree to that distribution?

7 A. It did not fund it, no.

8 Q. Before WestLB had declared its default,
9 had it used funds from those accounts to pay interest
10 on its loan?

11 A. Yes.

12 Q. Do you know why Bay North declared its
13 loan to be in default?

14 A. Yes. Because the senior loan was not
15 renewed. One of the conditions of our loan with the
16 Mezzanine was that that loan be current and in place
17 or paid off. One or the other.

18 Q. And was that declared default the basis of
19 Bay North attempting to foreclose its security
20 interest?

21 MR. BLUMENTHAL: Objection. I don't know
22 if he has the actual notice of default.

23 THE COURT: What was the question,
24 Mr. Hofmann?

25 MR. HOFMANN: My question was, was the

1 basis of Bay North attempting to foreclose its
2 security interests the cross default on the WestLB
3 that Mr. Shoaf described.

4 THE COURT: That was the question?

5 MR. BLUMENTHAL: That was a different
6 question.

7 MR. HOFMANN: My memory is not perfect,
8 your Honor. I do the best I can. That is a
9 rephrasing of what I had intended to say.

10 THE COURT: Is there an objection to that
11 question?

12 MR. BLUMENTHAL: No, sir.

13 THE COURT: All right. Okay. You may
14 answer that question.

15 THE WITNESS: To the best of my
16 recollection, there was one -- I don't remember
17 exactly. There were several reasons given. That was
18 one of them.

19 Q. (By Mr. Hofmann) That was one of them.

20 When money was not paid out of the reserve
21 account to contractors on the properties, you
22 testified, did that lead to the question of
23 mechanic's liens against the debtor's real property?

24 A. Yes.

25 Q. Did you convince some mechanic's

1 lienholders to hold off in asserting mechanic's liens
2 against the property?

3 A. We have a -- I have a very good
4 relationship with Jacobsen. And as a result, they
5 basically worked for as long as they could before
6 compromising their position under the law. So they
7 took -- they took as much time as they could to try
8 to not go to that step.

9 Q. And you encouraged them to do that?

10 A. I asked them, yes.

11 Q. Why did you ask them?

12 A. Because if we got liens on the property,
13 it would not be good for anybody involved.

14 Q. Would it impede the debtor's ability to
15 sell fractional units?

16 A. Yes.

17 Q. And eventually mechanic's liens were
18 asserted, correct?

19 A. That's correct.

20 Q. And that did, in fact, impede the sale of
21 fractional units?

22 A. Yes.

23 Q. Do you believe that WestLB had a
24 legitimate basis to declare this loan in default?

25 A. Yes.

1 Q. You don't believe their declaration of a
2 default was wrongful?

3 A. We did not -- we were unable to provide
4 the five million dollars as a partnership to pay down
5 the loan to meet the criteria of their renewal, and
6 so we were compromised with regards to our ability to
7 get that renewal done.

8 Q. So you believe WestLB was within its
9 rights when it declared the loan in default?

10 A. I think so, yes.

11 Q. Okay. Are you aware that the unsecured
12 creditors committee in this case has sued WestLB?

13 A. I'm aware they have sued it, yes.

14 Q. Have you read the Complaint in that case?

15 A. No.

16 MR. HOFMANN: Okay. Your Honor, at this
17 point, I'd like the Court to take judicial notice of
18 Exhibit 2, or PC-2, to be consistent. That is the
19 creditors committees' Complaint against WestLB.

20 THE COURT: Any objection?

21 MR. BLUMENTHAL: No, your Honor.

22 THE COURT: Exhibit PC-2 is received.

23 (Exhibit-PC-2 received.)

24 Q. (By Mr. Hofmann) Mr. Shoaf, could I
25 direct you to Exhibit PC-2?

1 A. Yes, sir.

2 Q. I'd like you to read to yourself, if you
3 would, Paragraph 6 that is on page three.

4 A. Okay.

5 Q. Do you believe that WestLB's conduct,
6 focusing on bullet point one, resulted in the debtors
7 being required to seek bankruptcy protection?

8 A. No. The debtor went under bankruptcy
9 protection on the 14th of September because they were
10 going to be foreclosed on on the 16th of September by
11 Bay North Apple Group.

12 Q. And Bay North's default was a result of
13 WestLB declaring a default?

14 MR. BLUMENTHAL: Object to form. I'm
15 sorry.

16 THE COURT: Sustained.

17 MR. HOFMANN: I'll withdraw the question
18 anyway.

19 Q. (By Mr. Hofmann) Do you believe that
20 WestLB's conduct -- I'm going to focus on bullet
21 point one -- or Roman numeral -- Romanette II in
22 Paragraph 6 -- resulted in WestLB refusing to release
23 escrow funds under its control?

24 A. I'm not sure I understood what -- say that
25 again. I'm not sure I understood.

1 Q. Do you believe that WestLB's conduct
2 resulted in WestLB refusing to release escrow funds
3 under its control?

4 A. I don't understand what you mean by
5 WestLB's conduct.

6 Q. Their conduct in declaring an event of
7 default under the loan and refusing to extend it.

8 A. I believe that WestLB asserted that the
9 money in escrow was needed to pay the shortfall of
10 the five million dollars created by the transfer to
11 Bay North, and as a result, they would not let any of
12 that money go.

13 Q. Do you know who directed the transfer to
14 Bay North?

15 A. It was done by WestLB.

16 Q. Okay. Mr. Shoaf, do you hold a position
17 with Easy Street Mezzanine, LLC?

18 A. Yes, I do.

19 Q. What is your position with that entity?

20 A. I'm one of the partners.

21 Q. Are you the -- are you the member of that
22 entity -- or the manager of that entity? Excuse me.

23 A. That's a good question. I don't really
24 know if I still am. I was at one point, yes.

25 Q. Okay. And with respect to Easy Street

1 Holding, do you hold a position related to that
2 entity? Are you the manager of that entity?

3 A. I'm a partner and I -- the same answer
4 with regards to Mezzanine. I'm not sure what I am at
5 this point.

6 Q. Do you believe that the plan in the Easy
7 Street Partners case in any way benefits Easy Street
8 Mezzanine or Easy Street Holding?

9 MR. BLUMENTHAL: Objection. Calls for a
10 legal conclusion.

11 MR. HOFMANN: I think on direct --

12 THE COURT: Sustained -- or -- excuse me.
13 Overruled. You may answer.

14 THE WITNESS: I'm not sure -- I'm sorry.
15 Could you say that --

16 Q. (By Mr. Hofmann) Does the plan that's
17 proposed in the Easy Street Partners case, the plan
18 under consideration today, does it benefit in any way
19 Easy Street Mezzanine or Easy Street Holding, LLC?

20 THE COURT: Okay. Okay. That wasn't your
21 question. I think you asked what his -- if he
22 believed it benefited.

23 MR. HOFMANN: As usual, the Court's memory
24 is better than mine.

25 Q. (By Mr. Hofmann) The question is, did you

1 believe that the plan under consideration benefits
2 either of those two entities?

3 A. I don't know.

4 Q. You don't know?

5 A. I don't know.

6 Q. Have you considered whether it benefits
7 them?

8 A. No.

9 Q. Okay. Do you know if any of the entities
10 holding member interests in Easy Street Holding voted
11 to submit the plan under consideration to the Court?

12 A. Yes.

13 Q. They did? And when did that occur?

14 A. A formal vote?

15 Q. Yes.

16 A. Well, the two of us or three of us are all
17 managers of the events we're going through. So Philo
18 Smith, myself, and Michael Fader of PC I are the
19 three managers that are running this process for
20 everybody.

21 Q. And did Mr. Fader vote in favor of
22 submitting the current plan to the Court?

23 A. He did not object. I don't know -- we
24 didn't do a formal vote, sir. But Philo and I have
25 agreed and it was distributed to Mr. Fader and we

1 haven't, frankly, heard from Mr. Fader in many
2 months.

3 Q. Do you believe you are authorized to
4 propose the plan on behalf of Easy Street?

5 A. Yes. We have -- two out of three votes
6 authorizes us to proceed forward.

7 MR. HOFMANN: No further questions, your
8 Honor.

9 THE COURT: Thank you. Mr. Hofmann, when
10 you need, you may be excused from the hearing.

11 MR. HOFMANN: Thank you, your Honor.

12 THE COURT: So, Mr. Wilson, hopefully we
13 won't retrace the questions that Mr. Hofmann asked.

14 MR. WILSON: I'm not smart enough to
15 conduct that examination, your Honor.

16 THE COURT: All right.

17 MR. WILSON: We should not.

18

19 CROSS-EXAMINATION

20 BY MR. WILSON:

21 Q. Good morning, Mr. Shoaf.

22 A. Good morning.

23 Q. May I ask you to look at W1's chart?

24 A. Uh-huh.

25 Q. Would you look at the box "Easy Street

1 Holding, LLC" and then the line directly above that,
2 and do you note there the box designating ABG-SL,
3 LLC?

4 A. Yes, sir.

5 Q. And at the time this chart was prepared,
6 was ABG-SLC the designated manager of Easy Street
7 Holding?

8 MR. BLUMENTHAL: Objection. We don't know
9 who prepared or when this chart was prepared. I
10 think it's -- and it's not in evidence. He can ask
11 the witness whether it's correct or not, but I don't
12 believe that's an appropriate question.

13 MR. WILSON: I'm just going to do that,
14 your Honor.

15 THE COURT: Why don't you do that?

16 MR. WILSON: I'm pleased to do that.

17 Q. (By Mr. Wilson) And let me just ask --

18 THE COURT: I mean, I thought you were
19 just going to ask your question without referring to
20 the chart.

21 MR. WILSON: No, I'm going to refer to the
22 chart.

23 THE COURT: Oh, okay.

24 MR. WILSON: If it weren't for the chart,
25 we'd all just not be having good days. But I will

1 pose a question.

2 Q. (By Mr. Wilson) Was -- in the -- at the
3 time this venture was formed with regard to these
4 Easy Street entities, was ABG-SL, LLC the designated
5 manager of Easy Street Holding?

6 A. At the time we formed?

7 Q. Yes.

8 A. Yes.

9 Q. Good. And who were the owners then of
10 ABG-SL, LLC?

11 A. Alchemy Ventures Trust and Cloud 9
12 Resorts.

13 Q. Okay. Alchemy Ventures Trust was owned or
14 controlled wholly by David Wickline; is that correct?

15 A. At that time, yes, that was my
16 understanding.

17 Q. And Cloud 9 Resorts, which was a
18 50-percent owner was controlled by you?

19 A. Still is, yes, sir.

20 Q. Thank you. And so the manager of Easy
21 Street Holding was controlled 50 percent by you and
22 50 percent by Mr. Wickline; is that correct?

23 A. Yes.

24 Q. Thank you. In August of -- and I think
25 maybe August 2nd of 2009, was a meeting of the

1 members of Easy Street Holding held?

2 A. I don't remember the exact date, but in
3 August we did have meetings, yes, sir.

4 Q. Okay. And at one such meeting, was a vote
5 taken to discharge ABG-SL, LLC as manager of Easy
6 Street Holding?

7 A. Yes, it was.

8 Q. Thank you. And who was -- who were
9 appointed as managers to replace ABG-SL?

10 A. Philo Smith and Elizabeth Rad.

11 Q. Isn't it true that you were likewise a --
12 designated as a manager?

13 A. Not until later, no, sir.

14 Q. Okay. When later did you become a
15 manager?

16 A. When the partnership voted to move forward
17 with a bankruptcy.

18 Q. Okay. And who are the managers now of
19 Easy Street Holding, LLC?

20 A. The managers of that, I would assume --
21 I'm still confused on that -- I would assume is Philo
22 Smith, myself, and Michael Fader.

23 Q. Okay. And isn't it true that you did, in
24 fact, sign the petition -- Chapter 11 petition -- in
25 this case as a manager?

1 A. Yes, sir.

2 Q. Thank you. And when -- I think my
3 question was a little unfair. You did sign the
4 petition of Easy Street Holding, the bankruptcy
5 petition of Easy Street Holding, as manager?

6 A. I think I signed all three as manager.

7 Q. Thank you. All right. I think I said
8 "this case" and this case is really Partners, so
9 thank you for your answers there.

10 When -- after ABG-SL was discharged as
11 manager, did that effectively terminate or cease the
12 managerial responsibilities or opportunities of
13 Mr. Wickline in the Easy Street venture?

14 MR. BLUMENTHAL: Object to the form as he
15 used the word "opportunities."

16 MR. WILSON: I think it's not a bad
17 question, your Honor. It's very general.

18 THE COURT: Well, it is maybe too general.

19 MR. WILSON: Well, I'm always --

20 THE COURT: I'm going to sustain the
21 objection and ask that you rephrase the question.

22 MR. WILSON: Okay.

23 Q. (By Mr. Wilson) Okay. Since the
24 termination of ABG-SL as manager, have you, as a
25 co-manager of the Easy Street entities, sought any

1 input from Mr. Wickline with regard to management
2 decisions?

3 A. No, sir.

4 Q. When the decision was made to file the
5 three petitions on behalf of Holding, Mezzanine, and
6 Partners, was a meeting of the members of those
7 three -- were meetings of the members of those three
8 entities held?

9 A. There was a meeting of all four entities,
10 sir.

11 Q. Which four?

12 A. AB -- Alchemy Ventures, Cloud 9, PC 1, and
13 Smith Trust. The form, by the way, is incorrect that
14 you have in the exhibit.

15 Q. What is incorrect?

16 A. This form is incorrect.

17 Q. Oh. Well, explain to me what is
18 incorrect.

19 A. Philo Smith is a hundred percent owner of
20 an entity called the Philo Smith Junior Trust.

21 Q. Yes.

22 A. And Utah Coal and Lumber is no longer
23 involved in the property.

24 Q. I see. Okay. And the -- well, so let's
25 just ask this. Was a meeting of the members of Easy

1 Street Holding, LLC held prior to the filing of the
2 bankruptcy petition for Easy Street Holding?

3 A. Yes, sir.

4 Q. Was it noticed to all of the members?

5 A. Yes, sir.

6 Q. Was it noticed to Alchemy Ventures Group,
7 LLC?

8 A. Yes.

9 Q. All right. And when was that meeting
10 held?

11 A. I'd have to check my records. It was
12 sometime in September.

13 Q. Okay. Did Mr. Wickline know about the
14 meeting?

15 A. Yes, sir.

16 Q. Did he participate?

17 A. I think so, yeah. Sure, yes.

18 Q. Did he vote in favor of filing of the
19 bankruptcy petition of Easy Street Holding?

20 A. No, he did not.

21 Q. Did he vote against?

22 A. Yes, he did.

23 Q. Okay. Now, there are two entities on this
24 chart: Cloud 9 Resorts-Sky Lodge Development, LLC to
25 the right, and Cloud 9 Resorts-Sky Lodge Management,

1 LLC to the left. And I think we've been talking
2 about them generally in this case as Management and
3 Development. Are you comfortable with that
4 designation?

5 A. Yes.

6 Q. All right. And are each of these two
7 entities, Resorts and Development --

8 A. You mean Management and Development.

9 Q. Management and Development, thank you --
10 are each of these two entities, Management and
11 Development, owned or controlled by an entity which
12 Mr. Wickline controls and an entity which you
13 control?

14 A. They are owned 50-50 by two entities that
15 each of us own, and they are controlled with joint
16 decisions in a hundred percent vote. Fifty doesn't
17 carry.

18 Q. Thank you.

19 THE COURT: Mr. Wilson, let me interrupt
20 you.

21 MR. WILSON: Please.

22 THE COURT: Try not to lose your train of
23 thought. I know that Mr. Hofmann is going to need to
24 leave soon. You and Mr. Hofmann are also
25 participants in a hearing currently set this

1 afternoon in another case.

2 MR. WILSON: Is that right, your Honor?

3 THE COURT: Well, it's currently right,
4 but I'm about to change it. The hearing this
5 afternoon will be continued to tomorrow at noon. And
6 so I'm going to take a brief recess.

7 Mr. Hofmann can -- what I'm going to do
8 is -- it looks like about the time Mr. Hofmann needs
9 to leave. I'll take a brief recess. You can contact
10 the parties associated with the CW Mining case and
11 inform them that they need not appear.

12 MR. WILSON: That will be fine. I'll see
13 that my office contacts that sphere.

14 MR. HOFMANN: Your Honor, it's the
15 court -- I have Mr. Bollie whose appearance is
16 timely. Depending on the Court's pleasure, we can
17 play it by ear. We may very well finish this hearing
18 and my absence need not impede the progress.

19 THE COURT: Well, I was skeptical Friday.
20 I'm skeptical today. So I'm going to open the
21 afternoon so that -- it's not fair to make Mr. Havel
22 and Mr. Blumenthal come back. I know that it's an
23 imposition on the CW Mining parties, but sometimes
24 the Court is forced to juggle.

25 If Mr. Bollie is here -- well, I need to

1 take a brief recess because I need to contact my -- I
2 need to let my judicial assistant -- give her some
3 instructions because I'm going to have to continue
4 another hearing tomorrow afternoon to accommodate the
5 CW Mining case.

6 So the Court will take a brief recess.

7 THE BAILIFF: All arise.

8 (Recess at 10:24 until 10:41 a.m.)

9 THE BAILIFF: All arise. Court resumes
10 its session. Please be seated.

11 THE COURT: Just to keep parties advised,
12 as some of you may know, Judge Boulden is retiring
13 later this afternoon. There is a formal recognition,
14 a retirement farewell. So we'll need to conclude by
15 4:45. I can't -- I'm hoping that wouldn't even be an
16 issue. But there is also an informal recognition
17 with the court staff today, and so I'll need to
18 recess today about 11:45 and we'll reconvene at 1:00.
19 So hopefully that will -- we could reconvene at
20 12:45, but 1:00 probably is easier to remember.

21 So, Mr. Wilson, you may proceed.

22 MR. WILSON: Thank you.

23 Q. (By Mr. Wilson) Mr. Wickline, the plan
24 that is currently before the Court for a
25 confirmation --

1 THE COURT: Mr. Shoaf, I think.

2 Q. (By Mr. Wilson) Mr. Shoaf, I'm sorry.

3 Who did I call you?

4 A. You called me David Wickline.

5 Q. You know what --

6 MR. BLUMENTHAL: He doesn't even know who
7 his own client is, your Honor.

8 THE COURT: Which I will overlook as --

9 MR. WILSON: And I'll admonish you and
10 everybody else around me, I have to -- you just have
11 to listen to what I'm thinking, not what I'm saying
12 and we'll be fine.

13 Thank you. I do know who you are.

14 Q. (By Mr. Wilson) The plan that was
15 previously proposed by the debtor, Easy Street
16 Partners, did provide, did it not, for payment of the
17 Management and Development claims in excess of
18 \$1,600,000 in full?

19 A. The answer to that, Mr. Wilson, is that
20 there was a provision that after no sooner than four
21 years that those two -- that those two claims could
22 be paid at the option of the plan funder. In that
23 particular plan, the plan funder was a third party,
24 and part of that structure was the payment of Bay
25 North's outstanding loans. So, yes, it did --

1 MR. BLUMENTHAL: Objection. Go ahead.

2 I'm sorry.

3 THE COURT: Well, I'm not sure that the
4 question was entirely responsive, but...

5 MR. WILSON: I'm okay with it, your Honor.

6 THE COURT: Okay.

7 Q. (By Mr. Wilson) Mr. Shoaf, yesterday --
8 on Friday, you testified somewhat about the liquor
9 licenses, and you had mentioned that -- that prior to
10 November of 2007 you had had some involvement with
11 liquor licenses in the Park City area. Am I
12 remembering that correctly?

13 A. From 2002 on, yes.

14 Q. Thank you. And then with regard to this
15 particular property, the Sky Lodge, it's true, is it
16 not, that the liquor license applications began
17 November 2, 2007?

18 A. I don't know the exact date, but in
19 November, yes, sir.

20 Q. Okay. Thank you. And were you involved
21 in that application process?

22 A. I was in charge of it, yes, sir.

23 Q. Thank you. And the process does require
24 that principals of the applicant come forward and
25 present themselves and undergo a criminal history

1 background check; is that correct?

2 A. Specifically anyone who owns more than 20
3 percent of whatever entity is involved must present
4 themselves to the alcoholic beverage commissions.

5 Q. And then you did, in fact, undergo that
6 background check, did you not, in connection with the
7 initial November applications?

8 A. Yes, sir.

9 Q. Thank you. And as did Mr. Wickline; is
10 that correct?

11 A. That's correct.

12 Q. All right. And the original applications
13 were made in the -- on behalf of Cloud 9 Resorts-Sky
14 Lodge Management, LLC, were they not?

15 A. The -- to be specific, those were issued
16 to Cloud 9 because we were the manager of the entity,
17 but the holders of the licenses are always the
18 individuals, which is why you have to submit yourself
19 personally.

20 Q. Thank you. Excuse me a moment. Are you
21 familiar with a company by the name of Cloud 9 Resort
22 Clubs, LLC?

23 A. Yes.

24 Q. Tell me what entity that is. Describe it,
25 please.

1 A. It's a special entity that I own a hundred
2 percent of.

3 Q. Thank you. And the same question, please,
4 with regard to Cloud 9 Resorts-SRR Management, LLC.

5 A. That is an entity that I no longer have
6 any holdings in. That was formed when Elizabeth Rad
7 purchased Sorrel River Ranch and asked me to be
8 involved for a period consulting when she bought it
9 and to help her do certain efforts down there.

10 Q. Okay. The liquor licenses are renewed on
11 an annual basis, are they not?

12 A. That's correct.

13 Q. And the renewal period ends what date?

14 A. It depends on the license. There are
15 certain licenses that renew in July and certain that
16 renew in October.

17 Q. Okay.

18 A. October, November.

19 Q. And there were licenses associated with
20 the -- with the Sky Lodge that are up for renewal
21 June 30, are there not?

22 A. They have been renewed as far as I know.

23 Q. And the process has been undertaken, has
24 it not?

25 A. Yes. It takes about 45 to -- days to do

1 the process. You have to do an audit. You have to
2 do a lot of application work.

3 MR. WILSON: Okay. May I have this
4 marked, your Honor?

5 THE COURT: You may.

6 MR. BLUMENTHAL: Do you have copies?

7 MR. WILSON: Two, perhaps.

8 THE COURT: All right. Have you shared
9 that with counsel?

10 MR. WILSON: No, but I'm going to.

11 THE COURT: All right.

12 MR. WILSON: May I approach, your Honor?

13 THE COURT: You may.

14 Q. (By Mr. Wilson) Mr. Shoaf, may I show you
15 what has been marked as Exhibit W-2, please, and ask
16 if you are familiar with it.

17 A. Yes, I am.

18 Q. Tell me what it is or tell the Court what
19 it is, please.

20 A. This is a club liquor license renewal
21 package for the bar that is located on the fourth
22 floor of the Sky Lodge.

23 Q. Okay. Thank you. And what involvement
24 did you have with this document?

25 A. As the holder of the renewing license, I

1 had to fill it out and provide the State with all the
2 data and information they requested.

3 MR. WILSON: Okay. I'll move the
4 admission of Exhibit W-2.

5 THE COURT: Any objection?

6 MR. BLUMENTHAL: No, your Honor.

7 THE COURT: Exhibit W-2 is received.

8 (Exhibit-W-2 received.)

9 MR. WILSON: Thank you.

10 Q. (By Mr. Wilson) If you would look at page
11 two. And do you see that -- that -- the State of
12 Utah Department of Alcohol and Beverage Control
13 acknowledges receipt of this renewal on May 20, 2010?

14 A. Uh-huh, yes.

15 Q. Thank you. Would you look at the next
16 page, Form A, please, and describe what that is,
17 please?

18 A. It's basically my answering the questions
19 associated with renewal.

20 Q. Thank you. And would you look at the next
21 page, which I believe at the bottom right, I'm just
22 noticing, identifies itself as page four of nine. Do
23 you have that?

24 A. Yes, sir.

25 Q. And do you see that your signature appears

1 on that document?

2 A. Well, I know it did, but it's been blacked
3 out.

4 Q. I see. Thank you. May I refer you to
5 page five of nine. It's Form B.

6 A. Uh-huh.

7 Q. All right. Look at Paragraph 2, please,
8 and do you see the words, "Cloud 9 Resorts-Sky Lodge
9 Management, LLC"?

10 A. Yes, sir.

11 Q. Good. And you note that that has been
12 blacked out -- or excuse me -- lined out?

13 A. That's correct.

14 Q. And who lined that out?

15 A. I did.

16 Q. And what -- has it been replaced by, in
17 handwriting, another entity?

18 A. Yes. Cloud 9 Resorts Club, LLC.

19 Q. And that is the entity that you control
20 100 percent?

21 A. That is correct.

22 Q. Thank you. And Cloud 9 Resorts
23 Management, LLC is the entity, is it not, that
24 appears on Exhibit W1 in the lower right-hand corner;
25 is that correct?